No. 16145

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD H. CLINTON,

Appellant,

vs.

JOSHUA HENDY CORPORATION, *et al.*,

Appellees.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of the Case.

Appellant was dispatched by his union, the Masters, Mates and Pilots, on September 17, 1954, to act as a relief mate on the vessel SS MARINE ARROW [Rep. Tr. p. 4]. He boarded the vessel and in the course of his duties determined to raise the gangway [Rep. Tr. p. 6]. There was an electric motor on the vessel for the purpose of raising the gangway and appellant pressed the button to activate this motor but it did not function [Rep. Tr. pp. 6, 16]. Appellant then obtained an emergency manual handle about thirty inches in length [Rep. Tr. p. 17] and placed it in the winch fall of the davit, such handle being for such use when the electric motor was not used [Rep. Tr. p. 17]. He wound the winch fall inboard by the use of this manual crank [Rep. Tr. p. 6]; raised the gangway two or three feet; left the manual crank in the davit winch axle where he had been cranking the davit [Rep. Tr. p. 17]; then went down on to the dock with another officer and later returned to the winch davit [Rep. Tr. pp. 17 and 18]. Appellant then attempted

to activate the electric winch again by pushing the button [Rep. Tr. pp. 10 and 18] and this time the electric winch functioned which caused the manual crank which had been left in it to move and strike appellant's knee causing the injury complained of [Rep. Tr. p. 18]. At the time of his injury no one else was involved in any of the activity at the winch and there was no one within fifteen feet of the appellant [Rep. Tr. p. 18]. As a result of his injury appellant was not fit for duty as a seaman for 29 days [Findings of Fact No. 4]. The sole proximate cause of the appellant's injury was his own negligence [Findings of Fact No. 3] and there was no negligence or unseaworthiness of the vessel which was a proximate cause of the appellant's injury [Findings of Fact No. 7].

The assignment of errors are:

1. That the trial court erred in its Finding that the sole proximate cause of the injury was appellant's own negligence.
2. That the trial court, in a prior proceeding in this action, dismissed an eighth cause of action on the ground apparently of lack of jurisdiction, and thus erred.
3. That the trial court apparently dismissed the first, second and third causes of action for lack of jurisdiction, and thus erred.
4. That the trial court erred in some prior proceeding in some dismissal in connection with some indefinite jurisdictional matter.
5. That the trial court had erred in not finding as to the status of respondent Pacific Far East Line.
6. That the trial court had erred in failing to award interest on the maintenance awarded herein.

ARGUMENT.

Before discussing the above allegations of error it is pertinent to point out that the burden is on the appellant to show that the findings of the trier of fact are clearly erroneous. (*Watson v. Button,* 235 F. 2d 235 (9th Cir.).)

In Admiralty matters there is no longer a trial *de novo* on appeal and the Federal appellate tribunals have no greater scope of review in Admiralty actions than they have under Rule 52a of the Federal Rules of Civil Procedure (*McAllister v. United States,* 348 U. S. 19 at 20, 99 L. Ed. 20 at 24).

First Assignment of Error.

The lower court, sitting in Admiralty, found that the sole proximate cause of appellant's injury was his own negligence [Findings of Fact No. 3]. This is substantiated by the evidence of appellant himself who testified that he had placed the manual crank in the davit winch axle, had operated the winch manually with such crank, had left the crank in the axle to go down to the dock, had returned to the winch and had pressed the button to activate it electrically while this thirty inch crank was still in it, that the natural result of the electric motor starting was to move the axle causing the crank to hit the appellant's leg causing the injury and that no one other than appellant was in the vicinity [Rep. Tr. pp. 16, 17 and 18]. Not only are the findings of the trial court in this regard not clearly erroneous, but are obviously supported by the evidence. The only object of pressing the button by the appellant was to activate the winch axle and with the crank still in the axle and the appellant standing close enough to be hit thereby the only reason-

able result, if the object of starting the motor were achieved, would be the precise thing that here happened, that is, the injury to appellant.

Second, Third and Fourth Assignments of Error.

Proctor for respondent Joshua Hendy Corporation is not at all clear as to what points are relied on by appellant in these alleged errors. However, it appears that this matter has already been heard by this Honorable Court in appellate action No. 15,056, reported at 254 F. 2d 370, and no comment is deemed appropriate nor necessary.

Fifth Assignment of Error.

The fifth assignment of error concerns the failure of the Court to find on the status of Pacific Far East Line, one of the respondents.

In the course of the trial the proctor for both appellees, Joshua Hendy Corporation and Pacific Far East Line, stipulated that the appellant was employed by Joshua Hendy Corporation [Rep. Tr. p. 29] and proctor for the appellant agreed that such was sufficient [Rep. Tr. p. 29]. Further, proctor for the appellees stipulated that Joshua Hendy Corporation was the owner and operator of the vessel and the employer of appellant and under those circumstances it is obvious that if appellant recovered either on the theory of unseaworthiness or negligence he would recover against Joshua Hendy Corporation. Both appellant and his proctor, Mr. Selwyn, agreed to look to Joshua Hendy Corporation for any judgment [Rep. Tr. p. 31]. There has been no showing that appellant has been prejudiced in any manner by a failure to find as to the status of Pacific Far East Line.

Accordingly, since it is well settled that a judgment may not be reversed because of any omission or commission which did not deprive the complaining party of any substantial right (*Lancaster v. Collins,* 115 U. S. 222 at 227, 29 L. Ed. 373 at 375; *Anchor Casualty Co. v. McGowan,* 168 F. 2d 323 at 325, 326), the appellant's position on this point cannot be maintained.

Sixth Assignment of Error.

The failure of the court to award interest in addition to the $232.00 maintenance judgment is cited by appellant as error.

There was no allegation in the libel (Sixth cause of action) relative to interest on any maintenance due nor was there any prayer therefor [Clk. Tr.]. On June 11, 1958, the proctors for libelant executed a Satisfaction of Judgment which was filed with the court in connection with the payment to them and appellant of the maintenance judgment of $232.00. In appellant's motion dated June 8, 1958, for modification of the Findings of Fact and Conclusions of Law there was no mention of any interest on the maintenance. Appellee concedes that interest may be given on maintenance awards by the trial court but in the absence of any prayer, evidence, statement or request therefor, it is not clearly an abuse of discretion not to have given interest on the court's own initiative. This failure of the appellant and his counsel to object to not having received interest on the maintenance award would appear clearly to have constituted a waiver thereof when the funds in payment of the judgment were received by them and the satisfaction of such judgment given.

The state of the appellate record, insofar as the proctor for the respondents is concerned, is confused by the various appellate documents filed by the appellant. Accordingly, the appellee's proctor hereby respectfully asks permission of this Honorable Court to request a supplemental transcript of record to contain the satisfaction of judgment herein and the appellant's motion for a modification of the Findings of Fact and Conclusions of Law, as bearing on this Sixth assignment of error.

Conclusion.

It is respectfully submitted that the judgment of the lower court herein be affirmed with regard to the Findings of Fact made thereby; but that if this Honorable Court should determine that interest should be added to the maintenance award herein, such be done by this Honorable Court and as thus increased, the judgment herein be affirmed.

Respectfully submitted,

Robert Sikes,

Proctor for Appellee Joshua Hendy Corporation.